Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF US LEC CORP., TDS METROCOM, LLC, FOCAL COMMUNICATIONS CORPORATION, PAC-WEST TELECOMM, INC., GLOBALCOM, INC., LIGHTSHIP TELECOM, LLC, AND ONEEIGHTY COMMUNICATIONS, INC.

US LEC Corp., TDS Metrocom, LLC, Focal Communications Corporation, Pac-West Telecomm, Inc., Globalcom, Inc., Lightship Telecom, LLC, and OneEighty Communications, Inc. (collectively "Commenters"), by their attorneys and pursuant to the Public Notice dated September 26, 2003, hereby provide their comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") regarding the Commission's rules implementing Section 252(i) of the 1996 Act, the so-called "pick-and-choose" rules. There is no basis for the Commission to change the pick-and-choose rules because the current rules are true to the statutory language, they do not "inhibit innovative deal-making," and new rules are not necessary to promote local competition.

I. The Statute Does Not Permit The New Interpretation Proposed By The Commission

Section 252(i) of the 1996 Act states, "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[1] In 1996, the Commission stated,

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[1] 47 U.S.C. § 252(i).

"We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. . . Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words 'any interconnection, service, or network element.'"[2] Further, "requiring requesting carriers to elect an entire agreement would appear to *eviscerate* the obligation Congress imposed in section 252(i)."[3]

The Commission's statutory interpretation was affirmed by the United States Supreme Court. In the view of the Supreme Court, "it is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language *almost exactly*. . . The FCC's interpretation is not only reasonable, it is the most readily apparent."[4]

The statutory provision as interpreted in 1996, and affirmed by the Supreme Court in 1999, has not changed since its initial passage. Thus, the Commission's interpretation of the statutory language is not susceptible to change. Further, the Commission's usage of terms like "surplusage" and "eviscerate" to describe an interpretation of the statute contrary to pick-and-choose evidenced no equivocation on the Commission's part. The Commission has no basis in the statute to completely reverse its prior conclusions regarding section 252(i).

Moreover, the pick-and-choose rules were not policy choices adopted by the Commission to implement an ambiguous statute. They were the necessary consequences of the Commission's reading of straightforward statutory language. While policy considerations entered into the

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2 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utils. Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*") at ¶1310.

3 *Id.* at ¶ 1312 (emphasis added).

4 *AT&T Corp. v. Iowa Utils. Board*, 119 S.Ct. at 738 (emphasis added).

discussion of the matter, they did not inform the Commission' statutory analysis. Policy considerations seven years later cannot alter the plain meaning of the statute.

II. The Proposed Rule Will Not Encourage Innovative Deal-Making

Commenters assert that the policy grounds on which the FNPRM is premised are meritless. The FNPRM states that the Commission's current pick-and-choose rules have resulted in "shortcomings."[5] As one carrier seeking to change the rules has argued, "the regime has impeded the type of marketplace negotiations that Congress intended to make a centerpiece of the transition from regulated monopolies to competition."[6] Further, under this view, the pick-and-choose regime "inhibits innovative deal-making."[7]

The Commission should not be misled by this misinterpretation of causes and effects. The only things inhibiting innovative deal-making are a lack of creativity by the deal-makers themselves and severely unequal bargaining power. Even if there were no unique interconnection arrangements or agreements,[8] there is no evidence that this is the result of the Commission's pick-and-choose rules. Rather, this is the result of the relationships between ILECs and CLECs in which carriers are both customers of and competitors to each other and one side—the ILEC—has dominant power. Absent special circumstances, ILECs have no incentive

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5 FNPRM ¶ 724.

6 FNPRM ¶ 713.

7 FNPRM ¶ 716.

8 Some would say that unique and creative interconnection agreements have already been negotiated under the current pick-and-choose rules. When ILECs asserted doggedly that they owed no reciprocal compensation for traffic terminated to Internet service providers, Verizon and Level 3 negotiated interconnection agreements that paid terminating compensation for ISP-bound traffic at rates significantly lower than reciprocal compensation rates but significantly higher than a rate of zero. Numerous carriers, including Focal Communications Corporation, adopted the Level 3 agreement pursuant to section 252(i).

Likewise, TDS Metrocom, LLC and SBC negotiated an interconnection agreement amendment for Wisconsin that imposed a performance measurement remedy plan on SBC. SBC needed such a plan for its application for section 271 authority. Some CLECs opposed the TDS Metrocom amendment on the grounds that it was insufficiently rigorous, yet it represented a mutual exchange of benefits between TDS Metrocom and SBC. The existence of the pick-and-choose rules did not deter SBC from negotiating with TDS Metrocom in this limited instance. In short, whether an ILEC willingly negotiates innovative terms with a CLEC has nothing to do with the pick-and-choose rules, but has everything to do with the ILEC's self-interest.

to engage in creative deal-making. First and foremost, they continue to maintain the view that anything that helps a CLEC harms the ILEC, and that the ILEC's obligation to provide services to the CLEC extends no farther than the ILEC's own interpretation of the 1996 Act. Second, the sad reality is that CLECs have very little to offer in return for concessions from the ILEC. Prior to the grant of section 271 authority, at least CLECs had support for checklist compliance as a bargaining tool, but even that has now been eliminated. Without any counterbalance to the ILECs' dominant bargaining position, it is unreasonable to believe that fair and creative commercial negotiations can take place.

If the Commission wants to encourage more creative deal-making between ILECs and CLECs, it must create incentives for ILECs to be more cooperative. Reversing the pick-and-choose rules at this point would actually create incentives for ILECs to be *less* cooperative with CLECs: by taking substantive rights away from CLECs because ILECs have been unwilling to engage in innovative deal-making, the Commission would be rewarding the ILECs for their intransigent negotiating positions. Revising the rules now would only encourage the ILECs to be more unreasonable.

Moreover, the ILEC argument is simply implausible. If it were true that the pick-and-choose rules make ILECs "reluctant to make any significant concession (in exchange for some benefit),"[9] then one would expect the ILEC to be willing now, or to have been willing in the past, to make significant concessions if there were no pick-and-choose rules. There is no evidence available in the underlying record or in past practice to suggest this situation to be true. None of the ILECs proffers the types of concessions it would be willing to make if the pick-and-choose rules were lifted. When the United States Court of Appeals for the Eighth Circuit stayed the Commission's pick-and-choose rules, and later vacated them, not a single ILEC stated that it

would take a more conciliatory approach to negotiations with CLECs as a result of being freed from the restrictions of the rules, nor did they. Similarly, when the United States Supreme Court reversed the Eighth Circuit, and the Eighth Circuit reinstated the pick-and-choose rules, negotiations would have ground to a halt, if the ILECs are to be believed. In both instances, if the ILEC position were credible, one would have noticed some change in ILEC behavior, but there was no discernible difference. There simply is no factual basis for the Commission to reach the conclusion that changing the pick-and-choose rules would alter the behavior of the ILECs. The Commission needs more than wishful thinking about ILEC conduct before it may take statutory rights away from CLECs.

III. Poison Pill Provisions Will Undo the Benefits of Section 252(i)

It is imperative that this Commission understands that ILECs have no interest in being cooperative with CLECs. Now that the BOCs have all received (or are about to receive) Section 271 authority throughout their regions, they no longer have *any* incentive to be cooperative. The ILECs view any position they may take to impede the CLEC industry and forestall competition as a position that improves their own success. If an ILEC has a colorable basis to keep a CLEC from obtaining an interconnection arrangement that the CLEC wants or needs, the ILEC will no doubt assert it. While one can argue that this is rational behavior for a monopolist, it is not conducive to give-and-take negotiations that result in good deals for their competitors.

For example, BellSouth has entered into an interconnection agreement with ICG Communications, Inc., which BellSouth represents is a nine-state agreement. In US LEC's attempts to adopt that agreement for only two states—and the agreement is filed on a state by state basis for approval with each state commission—BellSouth is attempting to force US LEC to adopt the ICG agreement for every state and not just the two states that US LEC has requested.

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[9] FNPRM ¶ 715.

Moreover, this purported nine-state agreement was not even filed with the Mississippi commission for approval, and thus is not available for adoption in that state. BellSouth wants to have its cake and eat it too.

One way to keep a CLEC from being a vibrant and viable competitor is to limit the CLEC's access to interconnection agreements. ILECs routinely take the position that no services will be provided to the CLEC without an approved interconnection agreement. Obtaining an interconnection agreement is both extremely time-consuming and expensive for the CLEC if it is compelled to negotiate terms with the ILEC. In many cases, the negotiations are fruitless and require the CLEC to utilize its limited resources to arbitrate the agreements. State commissions frequently request the CLECs to waive the nine-month statutory window to complete the arbitration, and CLECs generally are reluctant to alienate the state commissions by refusing the request. As a result, arbitration proceedings often take more than a year to complete.

The opt-in rights of section 252(i) significantly increase the ability of competitive carriers to enter the market. Thus, an ILEC would rationally seek to impair a CLEC's ability to obtain interconnection terms and conditions without having to bear the expense of negotiations. If CLECs were required to adopt entire agreements, rather than being able to pick-and-choose parts of agreements, the rational ILEC would be able to impede competitors by demanding inclusion of "poison pill" provisions into interconnection agreements with other carriers. Since the poison pill will be of no consequence to the CLEC negotiating the agreement, the ILEC demand likely will be easily satisfied. For example, an ILEC could plant extremely onerous requirements regarding unbundled network elements into an agreement with a CLEC that has no intention of using UNEs. Smaller carriers could be excluded from agreements made by large CLECs if unreasonable size or term discounts are included. By making the agreement unacceptable to

another CLEC, the ILEC has successfully limited the universe of agreements that a CLEC could adopt without bearing considerable expense. However rational this conduct may be, it is clearly anticompetitive.

IV. The Evidence Demonstrates That ILECs Will Discriminate When They Are Able

The Commission has previously stated its view "that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251."[10] The Commission has already been presented with ample proof of the extent to which an ILEC will discriminate against CLECs when given the opportunity. In the proceeding to consider Qwest's application for section 271 authority for the state of Minnesota, the Commission was presented with evidence from the Minnesota Public Utilities Commission of an intentional plan by Qwest to negotiate secret favorable agreements with CLECs.[11] While the primary offense for which Qwest was charged was failure to file negotiated agreements in connection with section 252(e), the record illustrates that Qwest, at least, is willing to offer certain terms and conditions to some carriers that it is not willing to offer to others. The Commission should not make the playing field more conducive to discriminatory conduct by ILECs, illustrated by Qwest's behavior, by eliminating the existing pick-and-choose rules.

V. Reliance on the SGAT Is Inappropriate

The Commission has proposed as part of its new rules to implement section 252(i) that "[i]f incumbent LECs do file and obtain state approval for a [Statement of Generally Available Terms]. . . the current pick-and-choose rules would apply solely to the SGAT, and all other approved interconnection agreements would be subject to an "all-or-nothing" rule requiring

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[10] *Local Competition Order*, ¶ 1296.

[11] *Application by Qwest Communications International Inc., for Authorization To Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, Memorandum Opinion and Order (rel. June 26, 2003), at ¶¶ 73-79.

carriers to adopt the interconnection agreement in its entirety."[12] This proposal should not be adopted because it places undue reliance on the SGAT, granting it a level of importance in the field of local competition that is completely unwarranted.

The SGAT was never intended to be a model interconnection agreement. Because CLECs knew they could negotiate their own interconnection agreements, adopt other interconnection agreements in whole, or pick-and-choose portions of approved interconnection agreements, CLECs rarely, if ever, scrutinized the BOC SGAT filings at the same level of detail that they scrutinized their own interconnection agreements. More often than not, SGAT filings were approved by state commissions with little, if any, CLEC involvement. Even when CLECs did participate in SGAT proceedings with an eye towards adoption or attempting to pick-and-choose sections of the SGAT, the resulting agreements did not enhance local competition. If the SGAT represented a short-cut to establishing acceptable terms and conditions for interconnection, CLECs would be picking-and-choosing from the SGAT already. The SGAT is simply not a reliable vehicle to promote local competition.

In the overall scheme of the 1996 Act, it is clear that the SGAT was never meant to be a substitute for interconnection agreements. The primary purpose of the SGAT is to provide the BOC with an alternate means of satisfying section 271(c), the so-called "Track B" available to a BOC when no CLEC requests interconnection with the BOC.[13] The implication is that a CLEC that requests interconnection with the BOC would negotiate its own interconnection agreement rather than rely on the template agreement submitted by the BOC and approved by a state commission. There is no other purpose for the SGAT under the 1996 Act than to provide a means for a BOC to obtain in-region long-distance authority in a state in which no competitor

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12 FNPRM ¶ 725.

13 47 U.S.C. § 271(c)(1)(B).

seeks to enter the market and interconnect with the BOC. Now that all BOCs have, or are about to receive, section 271 authority in every state, and because CLECs have requested interconnection in every state, the SGAT is an obsolete tool under the 1996 Act.

The Commission's proposal ignores this role of the SGAT. It would place undue emphasis on the SGAT by making it the primary vehicle for a CLEC that does not want to go to the expense of negotiating an agreement to obtain interconnection with the BOC. As a result, the Commission's proposal would have the effect of freezing a single model interconnection agreement into place. CLECs that have made the decision to opt-into the SGAT would have also already made the decision not to negotiate and arbitrate an interconnection agreement. Those carriers are not likely to pursue changes to the SGAT through a section 252(f) proceeding. Likewise, CLECs that choose to negotiate and arbitrate would have no reason to seek changes to the SGAT. The SGAT would become set in stone on terms favorable only to the ILEC.

Along these lines, it is inconsistent for the Commission to seek "market based" solutions to the problem of reluctant ILEC negotiators, and then rely heavily on the highly regulated SGAT process to encourage the growth of local competition. The Commission's proposal would make the interconnection agreement process even more complex than it is already.

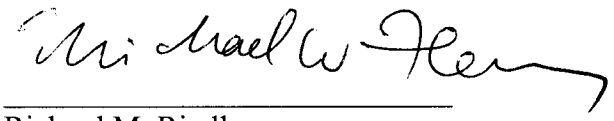
Further, applying a pick-and-choose rule to an SGAT makes no sense. Not only does the concept of "pick-and-choose" require at least two agreements from which to "pick" and to "choose," but the SGAT represents a BOC's bare-bones offering in order to satisfy what it considers to be its minimum requirements under the 1996 Act. There are no options other than options offered by the BOC for the CLEC to pick and choose from. Picking and choosing from the SGAT is about the same as Henry Ford telling customers they can have a car painted any

color they want so long as it is black.[14] The proposed changes to the rules implementing section 252(i) would severely diminish the rights of CLECs to obtain interconnection arrangements on favorable terms.

VI. Conclusion

For the foregoing reasons, the Commission should not revise its rules implementing Section 252(i) of the 1996 Act. The Commission's rules were based on statutory interpretation of unambiguous language rather than policy and there is no basis to change the interpretation when the statutory language has not changed. Eliminating the pick-and-choose rules would not encourage innovative deal-making by the ILECs. They already have little or no incentive or interest to cooperate with CLECs, and eliminating substantive rights held by CLECs is not likely to alter that fact. Reliance on the SGAT for interconnection terms and conditions would subvert the 1996 Act by placing undue reliance on a document that the 1996 Act does not expect a CLEC ever to adopt.

Respectfully submitted,



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[14] http://en2.wikipedia.org/wiki/Ford_Model_T.